Supreme Court of the United States

OCTOBER TERM, 1960

No. 2

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, Deceased,

Petitioner,

against

UNION CARBIDE CORPORATION,

Respondent,

against

AMHERST BARGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ERNEST FRANKLIN PAULEY,
Counsel for Petitioner,
Peoples Building,
Charleston, West Virginia.

GOLDSTEIN & STERENFELD,
S. ELDERIDGE SAMPLINER,
of Counsel.

HARVEY GOLDSTEIN,
on the Brief.

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Petitioner,

against

UNION CARBIDE CORPORATION,

Respondent,

against

AMHERST BARGE COMPANY,

Respondent.

APPLICATION TO PERMIT THE USE OF RECORD ON APPEAL IN GOETT v. UNION CARBIDE, ETC., No. 3, October Term, 1959.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HARVEY GOLDSTEIN, being duly sworn, deposes and says:

He is of counsel to the attorney for the Petitioner herein.

This matter was tried in the United States District Court for the Southern District of West Virginia, Charleston Division, in 1957. The Respondents appealed from a decree in favor of the Petitioner and the United States Court of Appeals for the Fourth Circuit reversed and dismissed the complaint.

Petition for writ of certiorari was granted by this Honorable Court and in due course, the entire record of prior proceedings was printed.

The matter was remanded to the Court of Appeals for further decision, which was recently handed down.

Petitioner is now making application for a writ of certiorari to the Court of Appeals and desires to employ the record previously printed for the prior argument of this matter before this Court.

There has been no further record with the exception of the decision of the United States Court of Appeals for the Fourth Circuit and judgment granted thereon, which petitioner consents to have printed and annexed to the record.

None of the parties hereto would be in any manner prejudiced by adverting to the record previously used. The monetary saving to the petitioner would be substantial.

WHEREFORE, deponent respectfully prays that the record employed in the case of Goett v. Union Carbide Corporation, et al., No. 3, October Term, 1959, be used herein.

Sworn to before me this
5th day of July, 1960

HARVEY GOLDSTEIN.

WARREN SMALL
Notary Public, State of New York
No. 30-3711175
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1961

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above matter on April 19, 1960.

Opinions of the Court Below

The opinion of the United States District Court for the Southern District of West Virginia, Charleston Division (Honorable Ben Moore), in favor of petitioner is unreported and is set out in the appendix to this petition at pages 1a to 6a.

The first opinion of the United States Court of Appeals for the Fourth Circuit is reported at 256 F. 2d 449, and is set out in the appendix to this petition at pages 7a to 17a.

Upon remand by this Honorable Court [1] to the United States Court of Appeals for the Fourth Circuit, a second opinion of that Court, unreported to date, is set out in the appendix to this petition at pages 34a to 40a.

Jurisdiction

This action, arising out of a maritime tort, was brought in the United States District Court for the Southern District of West Virginia, Charleston Division, as a civil action predicated upon diversity of citizenship and jurisdictional amount. The action was subsequently transferred on motion to the admiralty division of said Court.

The decree of the Trial Court in petitioner's favor was appealed by respondent, Union Carbide Corporation (hereinafter referred to as Carbide), and petitioner cross-appealed, *inter alia*, on the question of applicability of the West Virginia statutory monetary limitation of recovery in a wrongful death action arising out of a maritime tort.

The judgment of the United States Court of Appeals for the Fourth Circuit, opinion by District Court Judge Thomsen, reversing the Trial Court's determination was entered on May 27, 1958.

A petition for writ of certiorari was granted by this Court on March 2, 1959.

On January 18, 1960, this Court vacated the judgment of the Court below and remanded the cause to that Court for determination of the following questions:

> "'(a) Whether the West Virginia Wrongful Death Act, as to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; and, in the light of its determination, (b) whether the district judge's finding as to negligence is correct under the proper substantive law'"

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[1] The opinion of this Court, reported at 361 U. S. 340, is set out in the appendix to this petition at pages 20a to 33a.

* * * and (c) "whether the West Virginia Act incorporates this * * * (unseaworthiness) * * * standard of the general maritime law in death actions involving maritime torts."

The judgment of the United States Court of Appeals for the Fourth Circuit adhering to its prior decision and rendering judgment in favor of the respondent was entered on April 19, 1960.

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254(1).

Questions Presented

1. Whether, in this action for wrongful death under the general maritime law, the shipowner's vessel having been turned over to an independent contractor for periodic overhaul, the shipowner having actual knowledge of a defective condition prevailing at the time of delivery to the contractor (which defect was not part of the repair work to be done) and with knowledge of the nature of the overhaul operation to be performed:

(a) the shipowner was liable in failing to provide the deceased, contractor's employee, a business invitee, with a reasonably safe place to work;

(b) the shipowner was liable for lack of reasonable care in failing to ascertain the manner and method of completing the overhaul operation in safety and to take affirmative steps to correct the known defect, existing prior to delivery of the vessel to the contractor or to make certain that the contractor would take such steps to assure correction of the defective condition?

2. Whether the shipowner's warranty of seaworthiness continues with respect to maritime workers employed by a contractor during a periodic overhaul and "minor repair" operation?

3. Whether in this action for wrongful death arising out of a maritime tort, the remedy of the West Virginia Wrong-

ful Death Act limiting the monetary recovery is so offensive to traditional principles of maritime law that the admiralty jurisdiction should decline to enforce it?

4. Whether the general maritime law affords a cause of action for wrongful death?

Statutes Involved

Petitioner, as administratrix, sued to recover money damages for wrongful death and personal injuries grounded upon the Admiralty and Maritime jurisdiction, as supplemented by the Wrongful Death Statute of West Virginia, § 5474(5), which read as follows:

> "§ 5474. (5) Action for Wrongful Death.—Whenever the death of a person shall be caused by wrongful act, neglect, or default; and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. * * *".

Respondent, Carbide, asserted the applicability of § 5475(6), of the West Virginia Statutes:

> "§5475. (6) Party Plaintiff in Such Action; Damages; Distribution; Limitation.— * * * In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. * * *"

Statement of Facts

The following facts were set out in the Court of Appeals first decision, with additional bracketed matter inserted by the petitioner.

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge [when in transit], it had no life rings or other rescue equipment.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [when in transit], and it is not customary for such barges to be so equipped [for actual navigation]. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers. [The Trial Court found, as a finding of fact, that the barge was manned at the time of Goett's death (R. 236-237)].

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four

Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. [The purchase order contract called for painting and minor repairs at the total price of $4,712.60 (R. 207). Carbide conceded that they were indeed minor in its answer to plaintiff's interrogatories, #24 (R. 18)]. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting

equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sand blaster and was also wearing a respirator. He was not wearing a life jacket [concededly hazardous to the wearer (R. 154)], although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. [There was no evidence that Goett even knew of their existence. Other employees aboard the barge had no knowledge of their existence or availability (R. 58, 60, 65, 67)]. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so [because of the danger involved]. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off [due to panic] and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

[The manner of obtaining the life buoy on the digger boat, which was not thought of by the various workers in the excitement of the moment (R. 45), was explained by Martin, Amherst's superintendent—to run 160 feet from where Goett fell to the edge of the barge, step from the barge to a ramp 12 feet wide, step over a guard rail to a stairway of 11 steps and then go 15 feet to the preserver

and finally retrace the entire route holding the preserver (R. 101-102).]

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute. [The action was predicated upon the general maritime law as supplemented by the remedy afforded by the state Wrongful Death Statute] alleging that Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. [A petition for limitation in Admiralty was filed by Carbide and was stayed pending the determination herein.] Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the Admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case that negligence has been shown * * * "; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that

it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

Reasons for Granting the Writ

1. The decision of the Court below is at variance with decisions of this Court and of the several Courts of Appeals.

In accordance with the remand of the cause by this Court, 361 U. S. 340, the Court of Appeals found that the West Virginia Wrongful Death Act, as to this maritime tort, employed the general maritime law concept of negligence rather than that of West Virginia. In its applications or admiralty standards, the Court then erroneously limited the duty of the shipowner to providing a reasonably safe place to work to business invitees to those periods when the shipowner had custody and control of the vessel, holding that when the vessel was turned over to the independent contractor, the duty of the shipowner was merely to warn of hidden dangers and latent defects, contrary to the decision of the Second Circuit in *Halecki* v. *United*, 251 F. 2d 708, opinion of the Court by Honorable Learned Hand, affirmed by this Court, 358 U. S. 613, and of the Third Circuit in *Feinman* v. *Bull*, 216 F. 2d 393.

In *Halecki* the ship had been turned over to the contractor and in turn to a sub-contractor for the specific job

of dismantling and overhauling the ship's generators. Control of the ship was in the sub-contractor to the exclusion of the shipowner. The work necessitated the use of special machinery and safety equipment. No distinction was made between the duty owed by an employer to its employees (conceded by the Court below to be to provide a reasonably safe place to work) and that owed to a business invitee. Nor did control of the details of the work by the sub-contractor terminate that affirmative continuing duty of the shipowner to provide a reasonably safe place to work.

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the 'methods and manner' of its use were proper" (p. 711).

Reversing on other grounds, this Court, 388 U. S. 613, affirmed the holding of the Court of Appeals on the negligence aspect of the case.

> "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives the right of action, we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defend-

> ants were responsibly negligent in permitting or authorizing the method or manner of its use" (pp. 618-619).

Feinman v. *Bull*, 216 F. 2d 393 (3d Cir.), was a suit by a marine electrician injured by the falling hatch beam. The ship was being refitted by the plaintiff's employer, the independent contractor, at the latter's dock. Bull had relinquished control of the hatch to the contractor (p. 394). The Court declared the shipowner's duty to be as follows:

> "Obviously in a diversity suit brought by the longshore worker against a shipowner based on negligence, as in the case at bar, the shipowner cannot be relieved of liability when the ship's appliances have become defective or broken simply because he has relinquished control of the vessel to a stevedoring company. * * * 'The fact that there is a concurrent duty on the part of this man's employer would not excuse the shipowner from also meeting that obligation of furnishing a safe place to work' * * *. He must furnish a place that is reasonably safe * * *" (p. 396).

The Restatement, Torts, fully supports the view of the owner's continuing duty after divesting control of the property where there was an affirmative duty to provide safety. § 334, comment (b); § 413(b), comment (b); § 415; § 416, comment (b); §§ 425, 426, 427.

In *Kermarec* v. *Compagnie*, 358 U. S. 625, this Court obliterated the distinctions upheld by the common law in holding that all persons aboard a vessel for purposes not inimical to the interests of the shipowner were entitled to the exercise of reasonable care under the circumstances of each case.

The duty of a shipowner to provide employees of contractors a reasonably safe place to work has been laid down time and time again as a governing principle of maritime

law.[2] *Holley* v. *S.S. Manfred*, 269 F. 2d 317, 322 (4th Cir.); *Pope & Talbot* v. *Hawn*, 198 F. 2d 800, 803, aff'd 346 U. S. 406; *Skovgaard* v. *Tungus*, 252 F. 2d 14, affirmed by this Court, 358 U. S. 588; *Halecki* v. *United*, 251 F. 2d 708, aff'd 358 U. S. 613, *supra*, which was not discharged by any concurrent duty upon the worker's employer. *LaGuerra* v. *Brasiliero*, 124 F. 2d 553 (2d Cir.); *Fodera* v. *Booth*, 159 F. 2d 795 (2d Cir.); *Anderson* v. *Laurentzen*, 160 F. 2d 173 (2d Cir.); *Feinman* v. *Bull*, 216 F. 2d 393 (3rd Cir.). That responsibility of Carbide to give Goett a reasonably safe place to work, as clearly expressed in *Halecki* v. *United*, *supra*, by the Second Circuit and by this Court, was to continue not only at the time the contract with the contractor was made and the vessel turned over but also "during the entire period in which the concessionaire or contractor carried out his activities" (p. 711), unrelieved by any concurrent duty of the contractor.

Carbide, concededly having actual knowledge of the absence of any safety rescue equipment aboard the vessel, it was proper to leave to the Trial Judge, as the trier of the facts, the question of whether the manner and method of the operation was correct, whether Carbide used reasonable care in ascertaining the safety of manner and method and whether Goett was in fact given a reasonably safe place to work.

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[2] Since the duty of the shipowner was an affirmative one, the series of cases generally grouped together as "product liability cases" appear to be analogous to the situation herein. Liability for the most part has been predicated upon the failure of the manufacturer of the product to take due care in designing, testing or assembling its product. The landmark case of *MacPherson* v. *Buick*, 217 N. Y. 382, fell within that category. So to did *Pierce* v. *Ford*, 190 F. 2d 910, 913 (by the Court below) which affirmed the well settled rule that liability for failure to properly perform an affirmative duty was not negated by a concurrent or subsequent duty of another to inspect or provide the safety which the producer or owner should have attended to. Control of the product in another as a limitation of liability has never seriously been raised as a defense since the *MacPherson* case.

The District Court having found Carbide negligent, having knowledge of the conditions prevailing and the manner and method of the operation, in failing to provide Goett with rescue equipment, in failing to provide him with a safe place in which to work unqualified by any defense of assumption of risk or contributory negligence, its determination should be maintained.

The Court below erroneously confused the question of control with that of notice. In the instant case the shipowner concededly had *actual* knowledge of the negligent absence of safety equipment even before the vessel was turned over to the contractor. As such, the question of control of the ship at the time of the accident was immaterial.

In *Halecki* v. *United*, 251 F. 2d 708, *supra*, the owner's liability was bottomed not on the issue of control, which it did not have, but rather on its actual knowledge of the conditions which would prevail not only at the time the vessel was turned over but at commencement of and throughout the entire spraying and cleaning operation. The Court thus declared the owner's duty to be continuous notwithstanding the lack of control, unlimited by the concurrent duty of the employer and although Halecki himself was the expert having full knowledge of the conditions to be expected.

Petitioner submits that in *Halecki*, as in *Goett*, the shipowner was not in control of the contractor's operation, that the operation necessitated the use of special machinery, requiring specialists aboard the vessel, that despite those circumstances notice to or knowledge by the owner of the conditions that *would* prevail was sufficient to give rise to responsibility and ultimate liability.

Skovgaard v. *Tungus*, 252 F. 2d 14, a death action, involved a pump repairman who slipped and fell into hot oil. The Court of Appeals, explaining that the shipowner

had *notice* of the condition, clearly expressed the thought that knowledge of the defect was sufficient to give rise to liability arising out of the duty to provide a reasonably safe place to work for business invitees.

> "As to the negligence question, the holding of the district court that no duty devolved upon the vessel Tungus to clean up the oil spill was predicated upon a finding of fact that the operation of repairing the pump was conducted by El Dorado, and that no evidence indicated that Tungus personnel either supervised or controlled the discharge of the oil.
>
> While it may be true that El Dorado supervised the pump repair operation, this would hardly lessen the duty of the vessel to provide a reasonably safe place to work, especially since El Dorado's supervision was not so complete as to exclude crew members from the area. *In fact, it was the crew which first discovered the oil leakage and adopted temporary measures to stop it.* The Chief officer of the Tungus testified that it was the custom to offer the assistance of ship personnel to independent contractors unloading the vessel. *The personnel of the Tungus were well aware of the existence of the oil spill and the danger created by it.*
>
> The assimilation by Seas Shipping Co. v. Sieracki, 1946, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, of longshoremen to the position of seamen so far as unseaworthiness is concerned did not take away from the longshoreman his accustomed right to recovery on the theory of negligence. Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 413-414, 74 S. Ct. 202, 98 L. Ed. 143. Engaged in the work of unloading the ship, Skovgaard was a business invitee. See concurring opinion of Justice Frankfurter in Pope & Talbot, Inc. v. Hawn, supra, 346 U. S. at page 416, 74 S. Ct. at page 208; see also Santamaria v. Lamport & Holt Line, Err. & App. 1938, 119 N. J. L. 467, 196 A. 706. It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the

deck and tank and not by the instrumentality he intended to repair. Cf. Broecker v. Armstrong Cork Co., Err. & App. 1942, 128 N. J. L. 3, 24 A. 2d 194.

The duty of providing Skovgaard with a reasonably safe place to work, Hawn v. Pope & Talbot, Inc., 3 Cir., 1952, 198 F. 2d 800, 803, affirmed 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. Feinman v. A. H. Bull Steamship Co., 3 Cir., 1954, 216 F. 2d 393.

While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent" (pp. 18-19). (Italics ours.)

This Court, 358 U. S. 588, affirmed the lower Court decision not on a control theory but because the owner was aware of the existence of the oil spill with its consequent danger.

In *Pope & Talbot* v. *Hawn*, 198 F. 2d 800, affirmed 346 U. S. 406, the Court of Appeals placed the negligence part of the decision squarely upon the proposition that "The absence of the hatch covers over a length of time which could reasonably be construed as sufficient to have put appellant on constructive notice of that fact * * *", the appellant having control of the ship. Thus—control was an element which tended to prove constructive notice in absence of actual knowledge, which would give rise to responsibility to repair the defect.

In *Holley* v. *Manfred*, 269 F. 2d 317, involving the death of a longshoreman killed in a cave-in of potash while unloading the vessel, the Court below clearly pointed out the knowledge by the shipowner of the condition of the cargo as constituting a basis for liability.

In *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, a longshoreman was injured by falling cargo after the ship was turned over to the stevedores in a safe condition. The unloading operation set into motion an improper stowage condition. The Court, reversing a dismissal of the action and remanding for a new trial, held that the safe condition of a ship prior to turnover did not end the shipowner's duty to provide a safe place to work; that concurrent duty on the part of the stevedore could not qualify the primary responsibility.

> "Thus it thought the ship was turned over to the stevedores in a safe condition, and that there was no liability on the ship's part. Such a conclusion appears to entail a belief that the consequences of improperly stowed cargo, if not a result of the ship's construction, are assumed by the unloaders. In other words, full responsibility for negligent stowage falls on the stevedoring company, and it insures, so to speak, its employees against the ship's negligence. We cannot agree with this conclusion."

The Trial Judge held that Goett neither assumed the risk nor was contributorily negligent in the matter. The ruling was not "clearly erroneous", the test of reversal in admiralty matters. *McAllister* v. *United States*, 348 U. S. 19.

The doctrine of assumption of risk, as such, has been uniformly rejected by the Admiralty jurisdiction. *Panama* v. *Johnson*, 289 F. 964, aff'd 264 U. S. 375; *Sanford* v. *Caswell*, 200 F. 2d 830; *Becker* v. *Waterman*, 179 F. 2d 713; *Armit* v. *Loveland*, 115 F. 2d 308; *Secondbee*, 102 F. 2d 577; *Pittsburgh* v. *Palo*, 64 F. 2d 198; *The Calvert*, 51 F. 2d 494; *New Berne*, 80 F. 2d 244, extended to maritime workers, *Palermo* v. *Luckenbach*, 335 U. S. 20; *Imperial* v. *Drlik*, 254 F. 2d 4.

The rule that the duty of respondent to provide a reasonably safe place to work was terminated with its warning

of latent defects (which the Court below held to be unnecessary as being patent) was one of common law assumption of the risk by a workman of known defects rather than a "no duty" rule of law. The defense is unavailable in this cause of action applying maritime principles. Where knowledge of the defect by the worker does not obliterate liability, the owner cannot rely upon such knowledge to sustain its primary burden of providing reasonable safety. Thus—while the duty of an owner under both land and maritime principles may rest primarily upon proof of notice of the defective condition, either actual or constructive, the question of defenses available to that owner constitutes a prime difference between the two systems of law.

Guerrini v. *United States*, 167 F. 2d 352, involved an action by the employee of a subcontractor who slipped in oil on the deck of the ship in a yard for general overhaul. The District Court had held that the owner had not surrendered control of the ship.

The Appellate Court then held that state law was applicable (the case was decided prior to *Pope & Talbot* v. *Hawn*, *supra*; *Halecki* v. *United*, *supra*, and other recent cases holding that maritime principles would apply); that under New York law the duty to the libellant was the same as that of employer to employee. Thus—the Court defined the basic distinction between the mere duty to warn of latent defects and the affirmative duty to provide reasonable safety, and further expressed the thought that the duty only to warn was actually predicated upon the common law doctrine of assumption of risk as a complete bar, that the lack of the defense in admiralty created a continuing duty beyond the common law veil. In holding that the shipowner's duty went further than merely to warn, the Court stated:

> "As we said in that case, the New York decisions appear not to distinguish the measure of care due to a 'business guest' from that due from his em-

> ployer to an employee; and, if so, a failure to use reasonable care to provide for the 'guest's' safety is a breach of duty, even though the danger be apparent. At times opinions have read as though the duty was limited to pointing out the dangers and not including any affirmative provision for the safety of the 'guest' while on the premises. It is not surprising that this ambiguity should arise, because practically it makes no difference, since even though the owner's duty be the broad one, contributory negligence or assumption of risk is an absolute bar. However, in a suit in the admiralty the distinction becomes important, because if the shipowner owes a positive duty to provide a safe place, regardless of the openness of the danger, the 'guest's' contributory negligence is not a bar, but only goes in mitigation of damages. This is as true when no statute provides as when one does. Moreover, whether the defence is total or partial, depends upon the forum. Being therefore obliged to decide whether in New York the duty goes beyond warning the 'guest' of any dangers, we hold that the more common expression is authoritative, and that the duty is the same as that of employer to employee" (pp. 355-356).

Grudzilla v. *American*, 224 F. 2d 746, involving a longshoreman injured while unloading the vessel, suit for both negligence and unseaworthiness was brought for stowing cargo in an unsafe manner. Affirming the plaintiff's verdict, the Third Circuit stated:

> "The suit was based, first, upon alleged negligence of the defendant in the manner of loading the cargo and, secondly, upon a charge of unseaworthiness because of the unsafe manner in which the cargo was stowed. The defendant asserts broadly that our decision in Bruszewski v. Isthmian S.S. Co., 1947, 163 F. 2d 720, 1948, certiorari denied 333 U. S. 828, 68 S. Ct. 451, 92 L. Ed. 1113, settles this case in its favor, arguing that the danger, if any, was perfectly apparent and that the plaintiff assumed the risk when he went to work in the face of such apparent danger. We think the Bruszewski case does

not stand for any such sweeping proposition as this. Indeed, it is quite narrow. It means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work. Nor do we think that it is fair to characterize the difference between Bruszewski and Gindville as a mere matter of semantics. Gindville did not come to repair any condition. He came to help unload a cargo. If the difference is not apparent further discussion will not make it so" (p. 747).

Again in *Klimaszewski* v. *Pacific*, 246 F. 2d 875, a longshoreman was injured during the loading operation caused by slippage of a winch cable.

"The appellant complains about the court's instruction on assumption of risk. This question need not trouble us either. As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265, to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 U. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236, is squarely in point with just about every issue raised in this case. *A longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether his action is based on negligence or unseaworthiness*" (p. 877). (Italics ours.)

In *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, *supra*, the Court further pointed out that the concurrent responsibility of the stevedore to his employees did not avoid the shipowner's negligence; that the negligent order by the stevedore to continue work in the face of the known danger was not an assumption of the risk as a matter of law since

the sole choice was loss of the job. The Court therein held that the question was one of fact for determination by the District Court:

> "The trial court combined this factor of the nature of the bulkhead with an observation on the skilled nature of stevedoring. Even assuming the responsibility of stevedoring companies towards their employees, and assuming that here the employer was negligent towards plaintiff because the hatch boss required him to continue working under dangerous circumstances, the negligence of the ship was not avoided. Both could be concurrently negligent. Ford v. Allan Line S. S. Co., 227 Mass. 109, 116 N. E. 505; see Deserant v. Cerillos Coal R. Co., 178 U. S. 409, 420, 20 S. Ct. 967, 44 L. Ed. 1127. Certainly we cannot say the command of the hatch boss to continue work was an intervening cause such as to destroy the chain of events.
>
> If the element of the hatch boss's control over the stevedores is to have any bearing, it must be in relation to the question of contributory negligence of plaintiff. This was clearly a question for the jury. In view of the speed of work in unloading, the decision of the hatch boss to have the cargo lashed, the fact that the more obviously dangerous bags had been removed, and the order to continue work, we cannot say as a matter of law that plaintiff should have stopped work and risked losing his job in order to avoid the chance that he would be injured. Under the circumstances the jury might not unreasonably conclude that continuance at work was a justifiable exercise of judgment on the plaintiff's part" (p. 555).

The Court below failed to accept the settled concept that there could be no assumption of risk in absence of voluntary choice of safe or unsafe equipment or manner of performance of work, *Palermo* v. *Luckenbach*, 355 U. S. 20. Nor would continuation of work in the face of lack of proper or safe equipment give rise to the defense. *New Bern*, 89 F. 2d 244, 248 (4th Cir.); *Latiuerra* v. *Brasileiro*, 124 F. 2d 553, *supra*.

Petitioner submits that the failure of this Honorable Court to review this matter will destroy a half century of liberal thought in the maritime field by fostering an erroneous principle of control as an equation of liability rather than the well established test of notice, either actual or constructive. It will enable a shipowner to maintain its vessels in a defective and dangerous condition in an industry already generally considered to be ultra-hazardous, with the knowledge that it cannot be held responsible to those who work in the shipowner's interest during all repairing, overhauling, loading or discharging of cargo and all other periods when the vessel may be in the custody of an independent contractor. A finalization of law in that form has been rejected time and time again and would be a catastrophic return to the nineteenth century concept of supremacy of property over human rights.

Further, failure of this Court to review this issue may presage a return to the common law doctrine of duty upon the owner only to warn of latent defects. As stated in *Guerrini* v. *United States*, 167 F. 2d 352, the so-called "no-duty" rule of the owner was nothing more than the recognized common law rule of assumption of risk as a complete bar, a discredited rule of law contrary to basic maritime doctrine. As such, the decision of the Court below will serve to shift the burden of proof of that defense to the plaintiff in an attempt to prove plaintiff's lack of knowledge of the defect, necessary to avoid dilution of the defendant's primary duty under settled principles of maritime law to provide a reasonably safe place to work.

The shift of that burden to injured plaintiffs in the maritime industries must affect every litigant and will strike a fundamental blow to recognized liberal admiralty principle and procedure.

Petitioner respectfully submits that the decision of the Court of Appeals should now be reviewed in order to re-establish the uniformity of decision laid down by this Honorable Court.

2. The Court below in answer to this Court's request determined that the West Virginia Wrongful Death Act incorporated the doctrine of seaworthiness of the general maritime law in death actions involving maritime torts. The Court, however, adhered to its previous decision that Goett was not a person to whom the warranty of seaworthiness ran and that the Trial Judge was in error in finding the barge unseaworthy.

The decision of the Court below destroyed the effect of this Court's decision in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, wherein the doctrine of seaworthiness was extended to a carpenter brought aboard a vessel to repair a defect. The doctrine was thus extended to all classes of workers who were subject to the same dangers as those who sailed the ships and were entitled to like treatment.

Coupled with the *Hawn* case, *Alaska* v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, affirmed that the doctrine gave rise to a non-delegable duty as a species of strict liability irrespective of fault in holding that surrender of control of the vessel for a contractor's operation in furtherance of the shipowner's business did not terminate the owner's duty to provide the same protection to those performing maritime functions as was given to crew members, regardless of their employment status. See also: *Rogers* v. *United*, 205 F. 2d 57, rev'd 347 U. S. 984.

The *Hawn* and *Petterson* decisions have been consistently followed. The sole limitations of the extension of the warranty to maritime repair workers concerned major repair work (structural conversions) which were not traditionally ship's business. *Berryhill* v. *Pacific*, 238 F. 2d 385; *Berge* v. *National*, 251 F. 2d 717, and when the vessel was not in navigation at the time of the accident, *West* v. *United States*, 361 U. S. 118.

The warranty duty was enforced in *Torres* v. *Kastor*, 227 F. 2d 664, which involved a worker cleaning the hold from the effect of a previous cargo to make the vessel ready

for a new voyage; as it was to a night watchman in *Ross* v. *S. S. Zeeland*, 240 F. 2d 820; to men cleaning the deep tanks of a vessel, *Crawford* v. *Pope & Talbot*, 206 F. 2d 784; and a dock crewman freeing the railroad ties which held the ship in drydock in *Imperial* v. *Drlik*, 234 F. 2d 4; an electrician who fell off the deck while the ship was drydocked in *Lester* v. *United States*, 234 F. 2d 625; a maintenance foreman fixing a discharge pump in *Skorgaard* v. *M V Tungus*, 358 U. S. 588, *supra;* and lastly to a worker falling from a ladder during minor repairs of a periodic overhaul in *Lawlor* v. *Socony*, 275 F. 2d 599. Thus, the decision in the case at bar is in conflict with determinations of this Court and various Courts of Appeals and in fact is in conflict with its own previous decisions.

Narrowing of the doctrine's applicability solely to periods of loading and unloading of vessels for all practical purposes would destroy the remedy available to maritime workers performing ship's business and permit the shipowner to avoid its responsibility of assuring to those business invitees a seaworthy vessel while in the performance of repairs for the benefit of the shipowner.

The Court below conceded that the repairs herein were of a minor nature, lesser in extent than in the *Berryhill* or *Berge* cases or in *Raidy* v. *United States*, 252 F. 2d 117 (involving structural changes), yet negated the doctrine's applicability because the operation in progress at the time of Goett's death was that of sandblasting rather than loading or unloading of cargo from the vessel, and the control of the operation was in the contractor, even though Carbide had actual notice of the defect. The distinction, petitioner submits, is invalid and the Court's ruling erroneous.

The C. C. 204 was undergoing its periodic overhaul. As such it was never out of navigation, having been used for transit of cargo just prior thereto and was to return to such transportation purposes upon completion of the painting and minor repair work by the contractor.

Petitioner respectfully submits that Carbide's duty to provide a seaworthy vessel was no less in force than when the vessel was in transit, provided that Goett came within the class of workers performing "work traditionally done by members of the crew." *United* v. *Halecki*, 358 U. S. 613.

The work to be done on the vessel, set forth in the contract between Carbide and Amherst, consisted of sandblasting and painting the vessel and "minor repairs" (Pet. Exh. 12, p. 207). The minor repair was the replacement of Butterworth hatches. The entire contract price was $4,712.69, of which 24 hatches at $55.88 per hatch amounted to $1 341.12.

Goett was sandblasting the deck of the vessel at the time of his fall, an operation performed to prepare the deck for painting, the modern industrial way to take the old paint down to the metal. The seaman has, from time immemorial, painted his ship; he has traditionally and continues today to chip and scrape paint from the ship's surface preparatory to painting his vessel.

This Court has seemingly rejected what must be the contention of the Court below, that there can be no warranty of seaworthiness in force during periods of repair. See also: *Lawlor* v. *Socony*, 275 F. 2d 599 (2d Cir.). The *Goett* case represents the minimal fact situation of repair, both in extent and character of the work to be done by the contractor and its employees. Petitioner submits that no case heretofore decided on this issue of scope of doctrine is expressly in point. See footnote 7, *United* v. *Halecki*, 358 U. S. 613, 618. The rejection by this Court, however, of the decision by the Court below can be implied by the fact that this Court has not limited the scope of the doctrine to an exclusion of all repair periods in the several cases before it but rather has reached its determination upon the peculiar facts of each case.

Petitioner respectfully asks that this Court now review the case at bar for determination of the question in order

that the many decisions of the various Courts of Appeals may be molded into a uniform principle of law.

3. In its previous decision in this cause this Court did not answer the question as to whether the West Virginia Wrongful Death Act maximum monetary limitation of recovery was applicable to this cause of action arising out of a maritime tort, though in *Hess* v. *United States*, 361 U. S. 314, the issue was raised though not passed upon as to "whether a state wrongful death action might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them." (p. 320), thus raising the question of supremacy of the general maritime law over state law as an advancement of a national purpose in the maritime field in order to insure harmony and uniformity in its international and interstate relations. The rights and liabilities of litigants arising out of a maritime tort ordinarily depend upon the acceptance and application of the state statute by the admiralty, which are controlling wherever suit may have been instituted. *Western* v. *Garcia*, 257 U. S. 233, 241. The admiralty *forum* must adopt the state statute in every respect qualified only by its right as the *forum* to refuse to enforce statutory enactment against the policy of the admiralty jurisdiction in its effort to insure proper harmony and uniformity in its international and interstate relations. *Lottawanna*, 88 U. S. 558; *Workman* v. *New York*, 179 U. S. 552; *Knickerbocker* v. *Stewart*, 253 U. S. 149.

As stated in *Romero* v. *International*, 358 U. S. 354, "State law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system" (p. 373).[3]

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[3] Seemingly not dissimilar to the right of a *forum* to refuse to enforce a statute of the *lex loci* contrary to the public policy of the *forum*.

"In such a case as this it is incumbent upon the Admiralty to enforce the . . . (*lex loci*) . . . statute 'just as it would one originat-

(Continued on p. 26)

The District Court ruled that the $20,000.00 maximum monetary limitation of the West Virginia statute was applicable in actions of this nature.

ing in any foreign jurisdiction.' *Levinson* v. *Deupree*, 345 U. S. 648, 651." *Tungus* v. *Skovgaard*, *supra*, at page 595.

Restatement on Conflicts of Law, § 612, pages 731-732:

§ 612. Action Contrary to Public Policy.

No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.

Comment:

a. Distinction between policy denying access to courts and policy refusing to apply foreign rule of law. The rule stated in this Section is applicable when the entire basis of the claim upon which suit is brought is so contrary to the public policy of the forum that it will withhold altogether the use of its courts to enforce the claim. A distinction is to be noted between such a policy and the policy which, while it does not require denial of access to the courts of the forum, nevertheless requires the courts to apply certain local rules in the course of the litigation to enforce the local notions concerning the manner and method in which the courts of that state should function. This latter policy may be called the procedural policy of the forum. This procedural policy differs from the policy which denies access to the local courts under the rule stated in this Section in the following respect: in the former case, the legal relations between the parties as determined by the foreign law will be enforced subject to certain limitations imposed by local rules; in the latter situation the state refuses altogether to enforce the legal relations created by the foreign law."

Poling v. *Poling*, 116 W. Va. 187 (1935), held that rights created or recognized by the *lex loci* must give way when in conflict with law or public policy of the *lex fori*, that the public policy of the latter meant "the law of the state, whether found in the constitution, statutes, or judicial records" (p. 192).

See also: *McKnett* v. *St. Louis*, 292 U. S. 230; *Loucks* v. *Standard*, 224 N. Y. 99; *Herzog* v. *Stern*, 264 N. Y. 379; *Weissengoff* v. *Davis*, 260 F. 16 (4th Cir.); *The Titanic*, 233 U. S. 718, at pp. 732-733; *Black Diamond* v. *Steward*, 336 U. S. 386.

The Court of Appeals did not specifically rule upon the issue since it was unnecessary to its holding.[4]

Query: Does the monetary limitation set forth in the West Virginia Statutes, § 5475(6), contravene the policy of the maritime law.

Workman v. *New York*, 179 U. S. 552, a libel by the shipowner resulting from a collision between his vessel, moored at a City dock, and a City owned fireboat, involved a sovereign, exempt from suit except by statutory permission and which, by municipal law, limited liability. This Court upheld the doctrine that the general maritime law, as a constitutional grant of power, controlled the issue of monetary limitation; that to permit local law to limit recovery would be destructive of the essential characteristics and uniformity and harmony of the Admiralty jurisdiction which would result in the "practical destruction of a uniform maritime law".

> "The practical destruction of a uniform maritime law which must arise from this premise, is made

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[4] The Court below stated generally that the substantive law of the state involved must be accepted and cited *Quinette* v. *Risso*, 136 F. 825, as controlling the issue of limitation of damages. *Quinette* was nothing more than a statement that the Court favored looking to the recoveries granted by the State Courts under similar facts and circumstances in the assessment of damages. The case did not concern a monetary limitation under a Wrongful Death Statute since the sum awarded was only $4,000.00.

If this Court determines that the "death maxim" was applicable, that Goett's sole remedy was pursuant to the Wrongful Death Statute of West Virginia, but that the statuory maximum recovery section of the Act was inapplicable, petitioner submits that the cause should then be remanded to the District Court for further findings of damages only.

The West Virginia Statute permitted recovery for loss of future support and for mental anguish of the widow. It did not permit recovery for pain and suffering of the decedent prior to death or for nurture. As such, the District Court finding of damages for Goett's pain and suffering and nurture would be stricken and a further finding of damages made for the mental anguish of Goett's widow.

manifest when it is considered that if it be true that the principles of the general maritime law given relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law, would be necessarily one thing in one State and one in another; one thing in one Port of the United States and a different thing in some other Port. As the power to change state laws or state decisions rests with state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed, would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution, it would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels." (p. 558). • • •

"In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States." (p. 560).

The Thielbek, 241 F. 209, was an appeal in an admiralty suit by shipowners against each other and against the City of Portland, which arose out of a collision. The decree was in favor of one shipowner against the other and the city. The latter was engaged in pilotage and towage service under legislative enactment which had in its charter a limitation of liability of $10,000.00. The decree was for a sum greater than the limitation.

The Court, in affirming, held that local law or statutes could not abrogate or limit the amount of damages recoverable under the maritime law in a suit properly before an Admiralty Court.

See also: *Southern* v. *Jensen*, 244 U. S. 205, and *Knickerbocker* v. *Stewart*, 253 U. S. 149, in which this Court affirmed the view that the state could not, by legislation, grant a compensation remedy to maritime workers in derogation of their maritime rights to damages; and *Moore-McCormack* v. *Amirault*, 202 F. 893; *Newburgh* v. *Texas*, 227 F. 2d 732, and *New Zealand* v. *Earnmoor*, 79 F. 368, in which the question of interest as a part of the recovery of damages was held to be controlled by maritime principles rather than by state legislation.

While the cases cited do not concern themselves with wrongful death statutes, the rule of law would seem to be in point, that a suit existing by virtue of statutory permission, and having a monetary limitation may not enforce the limitation as being contrary to the avowed policy of the Admiralty jurisdiction to insure harmony and uniformity in the essential characteristics of the maritime law.

Petitioner respectfully submits that the monetary limitation under the West Virginia legislation was unacceptable and unenforceable in this suit for wrongful death arising out of a maritime tort, that this question, not answered by this Court, though present in all maritime wrongful death cases arising in sixteen of the States should now be reviewed and determined.

4. This Court did not, by reason of the nature of its prior decision, answer the question of the validity of the decision in *The Harrisburg*, 119 U. S. 199.

In 1886 this Court in *The Harrisburg*, 119 U. S. 199, considered the question of whether a suit *in rem* would lie for the death of the first officer of a vessel off the coast of Massachusetts. The vessel was registered out of Philadelphia. Both Massachusetts and Pennsylvania had wrongful death statutes having a one year statute of limitations. The suit was brought by the widow five years after the death of her husband.

The Court stated the issues to be:

> (a) Whether a death action would lie in Admiralty in absence of a Federal or State statute;
>
> (b) If not, whether an action would lie when a rigth of action was given by a State statute, and
>
> (c) If so, whether the State statute of limitations would prevail?

The Court then fully discussed a number of decisions which had recently (at that time) determined the question. Those cases which had decided in favor of an abatement had done so on the basis of the death maxim under the common law; those which had ruled against the abatement had done so on the basis of inherent justice and equity principles of the maritime law.

Admitting that under Scottish or French law a recovery would be permitted (pp. 212-213), the Court ruled that there was no evidence presented of a different death maxim in the admiralty jurisdiction than on the land in any country, that since the Court had the right only to declare what the law was and not what it should be, there could be no recovery.

As such, the basis of the Court's decision was that maritime law was the same as the landside law [5] and that, although there were numerous cases to the contrary, based upon justice and the equity of the situation, the Court did not have the power to determine the law upon social policy.

The Harrisburg is the leading case and is, in fact, the basis for the doctrine, as we know it today, of abatement of the cause of action at death under the general maritime law. Cases since *The Harrisburg*, almost without exception when upholding this harsh principle, cite it as covering the question.

Petitioner respectfully submits that this Honorable Court should now reconsider this entire question to determine whether the force and effect of this 72 year old decision should now be negated in light of the vast changes of moral and legal thought which have permeated every phase of the general maritime law since that time. The modern Admiralty suit was first perfected by the Roman law and is similar to the civil law as it is still practiced by countries subject thereto.

When the *Harrisburg* decision is read in light of the historical background of the law, it would appear that the Court was not duly apprised of the many other sources of law from which the maritime jurisdiction of the different nations and American colonies had developed. The Court looked only to the common law in determining the scope of the general maritime law, the *one* legal system which

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[5] Of note was the statement that Lord Campbell's Act of England did not (at that time) permit suit in Admiralty, citing *Vera Cruz*, 10 App. Cas. 59, which Act has since been revised to permit such cause of action.

Whether the Court's decision would have been the same had the English Lord Campbell's Act permitted a suit in Admiralty at that time, as it now does, is indeed questionable.

The Court did not appear to take into consideration the fact that some of the states did not follow the common law.

violently opposed the general maritime law. It cannot be contradicted that the maritime law was taken by the English from the Codes of nations which had perfected legal theory centuries before English civilization progressed from an age of savagery.

The principle of abatement of a cause of action by death was but a corollary principle arising out of the tort theorems of feudal England that "trespass" was of intentional character and was to be repaid by the "an eye for an eye" doctrine of revenge.[*] As such, "death was the great composer of strife."

The Court in its *Harrisburg* decision readily admitted that the doctrine was harsh and unyielding in a system of law grounded upon equity and justice. It freely conceded that a number of cases had determined that a cause of action for wrongful death would lie, based solely upon tenets of righteousness and compassion for the family of the deceased seaman, but felt bound to pursue the policy of the common law in the absence of any evidence that the law of the sea was different than the law of the land. The Court did not attempt to take into consideration those other systems of law, from which the general maritime law, as we know it, most assuredly developed and which, in fact, permitted a cause of action to continue unhampered by the death of the wronged party. The Court further pointedly implied that if it felt free to determine the matter on grounds of justice and equity, an opposite conclusion might well have been reached.

The last 50 years has seen extensive legislation concerning the health and safety of workers in the maritime and railroad industries.

The Federal Employers' Liability Act, 45 U. S. C. § 51, *et seq.*, in 1908 granted the right of claim by a railroad

[*] "A trespass on the case, which eventually evolved into the action [illegible] was developed as a legal theorem until a later date"

worker against his employer for the negligence of said employer. The Merchant Marine Act of 1920 (the Jones Act), 46 U. S. C. § 688, extended the rights granted to the railway employees by the Federal Employers' Liability Act to a seaman against his employer. Neither enactment set forth specific survivor benefits, *The Miramar*, 31 F. 2d 767, aff'd 36 F. 2d 1021.

Congress then effected a cause of action for wrongful death of any person on the high seas, Death on the High Seas Act, 46 U. S. C. § 761, *et seq.*

Passage of the Jones Act in 1920 gave to crew members, to longshoremen and harbor workers, the right of a cause of action against their employer. Thus—from that time and until the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, 33 U. S. C. § 901, *et seq.*, a worker such as the deceased herein, had a cause of action for wrongful death arising out of the negligence of his employer. The coverage for a cause of action for wrongful death of all maritime workers was thus complete whether the accident occurred at sea or on the territorial waters of a state.

It was only upon the passage of the Compensation Act, *supra*, that the newly legislated right under the Jones Act was limited to crew members, as the exception to the coverage of the created Federal Compensation System.

Just v. *Chambers*, 312 U. S. 383, was an action for wrongful death by drowning, arising out of employment on a yacht in the territorial waters of Florida. The Supreme Court, discussed whether the Wrongful Death Statute of Florida would be recognized and enforced by the admiralty Courts and stated, concerning the exercise of the judiciary power in establishing maritime law, that:

> "The rule of the non-survival of a cause of action against a deceased tortfeasor has but a slender basis in admiralty cases in this court. See Crapo v. Allen, 6 Fed. Cas. (No. 3360) 763; Cutting v. Seabury, 1

> Sprague 522, 525; In re Statler, 31 F. 2d 767, 36 F. 2d 1021; Cortes v. Baltimore Insular Lines, 287 U. S. 367, 371" (footnote 4, p. 387).

The Court stated that leading continental states, whose law had developed from the civil law, permitted a cause of action arising out of wrongful death. Hughes on Admiralty, Chapter X, Sections 108-110, pages 224-226.

Cox v. *Roth*, 348 U. S. 207, indicated that this Court might reconsider the "slender basis" of the Admiralty rule against survivorship of death action if the issue was properly posed, noting that:

> "Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction. See the discussion by Roscoe Pound on Death Statutes as Part of the General Law, 13 NACCA L. J. 188-189 (May 1954)" (p. 210).

The Court itself has thus implied that it would consider whether such abatement has retained its vitality in view of the fact that the "slender basis" for the rule of non-survival in admiralty has been whittled away by legal and social progress to a point where it should no longer form a proper support for an archaic rule in disrepute for many years.

In *Kernan* v. *American*, 355 U. S. 426, the Court again appeared to react unfavorably to the effects of *The Harrisburgh* decision, evidenced by a footnote in the decision couched in terms of what seems to be dissatisfaction at the obviously unsatisfactory result of the abatement doctrine.

Admiralty is not a derivation of the common-law but takes its principles from the many legal systems of the

maritime world as adopted and accepted by present day legal thought in the United States.

Benedict on Admiralty, Vol. 1, § 8, pages 9-11 stated:

"§ 8. Origin of Admiralty and Maritime Jurisdiction.

Unlike the common law, the American admiralty is not a derivation of English jurisprudence but of the general maritime law adapted to our circumstances and molded by our practice. The admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England—or by the local traditions of that land—but is to be interpreted by an original view of its essential nature and objects and with reference to analogous jurisdictions in other countries constituting the maritime commercial world as well as the jurisdiction in England. Those who framed the Constitution and the lawyers in America in that day were familiar with the jurisdiction different and more extensive in most of the original States when they were colonies than was allowed in England. The general system of maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' Admiralty cases are as old as navigation itself and, as they arise, the law, admiralty and maritime, as it has existed for ages, is applied by our courts. The general maritime law, however, is only so far operative as law in any country as it is adopted by the laws and usages of that country. There is no 'mystic overlaw.' It is the maritime law as accepted and received in the United States that governs and, though the general maritime law is the ground work of our own maritime system, it is only by voluntary adoption and with such qualifications as our jurisprudence and statutes have made in it that it becomes our law. It is in this sense—a sense that contemplates both judicial adaptation and legislative modification—that it may be said that the Constitution

> itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law. The precise scope of admiralty jurisdiction is 'not a matter of obvious principle or of very accurate history' but the jurisdiction is of broad scope in this country and the progress of our jurisprudence in freeing the jurisdiction from pre-revolutionary English restrictions and in giving a distinctive character to our maritime law has been marked by the overruling of earlier decisions and the qualification or rejection of earlier expressions of judicial thought" (pp. 9-11).

Bisso v. *Inland*, 349 U. S. 85, was noted for its affirmation of this Court's scope of power to determine legal issues on the basis of public policy as well as judicial rule, a right it evidently felt it did not have in 1886.

Burnet v. *Coronado*, 285 U. S. 393, discussed the strength of *stare decisis* (dissent opinion of Mr. Justice Brandeis, since he called for an overruling of a prior decision by the Court). With utmost candidness Justice Brandeis laid down the rule that *stare decisis* should be followed only when results would adequately protect the public.

> "*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' Hertz v. Woodman, 218 U. S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare National Bank v. Whitney, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often over-

ruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Compare Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 681. Recently, it overruled several leading cases, when it concluded that the States should not have been permitted to exercise powers of taxation which it had theretofore repeatedly sanctioned. In cases involving the Federal Constitution the position of this Court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution." (pp. 405-410) (Italics ours)

It would appear that the Federal Courts which have found themselves bound by the common law rule of abatement, have only reluctantly come to that conclusion. The hope of future remedy by judicial decision or legislation of a doctrine that has no meaning in the law as we know it today has often been expressed. It seems apparent that this rigid medieval doctrine based upon the "vendetta" should have no place in the modern conception of justice and equity which has, from time immemorial been the guiding force in maritime matters. By its destruction of claims by means of construction of a fictional difference between a cause of action for a personal injury and one for wrongful death, the death maxim has succeeded in the erection of an artificial barrier to just, equitable and meritorious determinations of death claims.

Surely, Justice Brandeis' decision in the *Burnet* case, *supra*, gives meaning to the law as the shaping force of our nation, alive to the changes and modifications of legal

thought and governed only by what has been accepted as the wise rule of action in the light of experience and the force of better reasoning.'

Acting upon what petitioner considers to be a directive from this Court, this issue as to whether there shall, in the future, be an abatement of a cause of action arising out of a maritime tort upon the death of the wronged party is herewith most respectfully presented for consideration.

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[1] While all states have either wrongful death or survival statutes, or both, the following may have importance in explaining the destruction of the uniformity of the maritime law as a result of variation in the state legislation.

[2] There are 16 states with limitation of maximum benefits. In each state the limitation depends upon the dependency elements and the relationship of said dependency. Some permit recovery for hospital expenses, some for pain and suffering, some for mental anguish of the dependents.

It would seem that the dependency of the general maritime law upon the various state statutes, while on the surface appearing to alleviate the harshness of the common law rule of abatement, basically fails in its purpose insofar as it concerns suits arising out of a maritime tort, since it strikes at the very core of the purpose of the maritime law, uniformity and harmony in its essential characteristic features of international and interstate relations.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: July 15, 1960.

Respectfully submitted,

ERNEST FRANKLIN PAULEY,
Counsel for Petitioner,
Peoples Building,
Charleston, West Virginia.

GOLDSTEIN & STERENFELD,
S. ELDRIDGE SAMPLINER,
of Counsel.

HARVEY GOLDSTEIN,
on the Brief.

APPENDIX

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore)

The Court: I am going to make a finding of fact and conclusions of law, and in doing so I do not expect to discuss the facts or the law any further than is enough to show an appellate court, if the case should be appealed, the basis on which I rest the findings both of fact and of law.

The findings of fact, then, are these:

First: There was no safety or rescue equipment on the barge from which the plaintiff fell to his death.

Two: It was foreseeable to defendant Union Carbide and Carbon Corporation, as its name was then—is that its name then or now?

Mr. Love: Then. That's the name in the case.

The Court: That in the sandblasting operations which they knew or should have known would be carried on on the barge by Amherst Barge Company for the purpose of the work that was then being done on the barge that many men would work on the barge in the manner Goett was working.

Three: That under these circumstances it was negligence for Union Carbide and Carbon Corporation to omit equipping the barge with reasonably effective and available safety and rescue equipment.

Four: The barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used.

Five: Failure to provide rescue equipment was the proximate cause of Goett's death.

Findings of fact as to damages: the court finds that the amount which is fair and just to cover the intangible damages of the deceased's family, including mental anguish and bereavement, is the sum of $5,000, that in addition to damages for those elements the court finds that the distributees suffered financial and pecuniary loss in an amount exceeding, when added to the $5,000, the sum of $20,000, and that therefore under the rule of law which I apply to this case the amount of damages that are to be included in the recovery is $20,000.

I find that no punitive damages are proper in this case.

Proceeding, as was suggested, to find what would be the recovery in case the limitation set down by the West Virginia wrongful death statute is not applicable, I find these facts with reference to damages: that the reasonably expected annual earnings of Mr. Goett which would have been attributable to the expenses of his family rather than his own expenses, is $1500 a year for the entire expectancy of thirty-six years; and in arriving at that figure I take into consideration the fact that by the time of the expiration of his expectancy Mr. Goett would be a fairly old man and that he could not reasonably be expected, in view of the general health hazards of life, to earn during his entire expectancy the amount that he earned during the immediate week preceding his death, but that he probably would earn an amount for the whole length of time which would average what he made in the six months before his death, which would mean about $2800 a year, and I find that of that sum it would be reasonable to assume that he would use all but $1500 for his own maintenance expenses; so if he earned $1500 a year for thirty-six years, he would in that time earn $54,000 applicable to the expenses of his family.

I think that the present worth of that sum of money should be calculated on a four per cent basis rather than a three per cent basis. Calculated on a four per cent basis, I find that it amounts to $31,400.

I find further that the amount which is fair and just to compensate for the nurture of the deceased's daughter, who was living with him for the period of her infancy, is $5,000; and I further find that the amount which is fair and just to compensate for the pain and suffering of Mr. Goett himself and other intangible losses which are properly compensable under the rules of admiralty is $3600, all of which added together produces a total of $50,000 as the grand total, which would be a fair and just award if there were no limitation as fixed by the West Virginia statute.

Conclusions of law are as follows: I find that this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown, as I have said.

I conclude that it was the duty of the Union Carbide and Carbon Corporation under the circumstances of this case to provide both reasonable safety equipment in order to furnish workmen who worked on the barge a safe place to work, and I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck, and it was also the duty of Carbide to provide reasonably suitable rescue equipment, which it was their duty to place in a position on the barge where it would be immediately available in case of need.

I find further as a conclusion of law that Union Carbide and Carbon Corporation is not responsible for any negligence, if such there was, on the part of Amherst Barge Company in not furnishing to the workmen the life jackets that made up a greater part of the testimony.

On the question of contributory negligence my conclusion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence.

Under the evidence in this case it is quite possible and just as probable to my mind that Goett may have accidentally fallen without any negligence at all on his part as that he negligently went over the side. There are many constructions on the deck, some of them close to the edge, and he may have struck one of those, and if he did there is no evidence that he was negligent in so doing.

As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume.

The final conclusion of law is that the plaintiff is entitled to recover against defendant Union Carbide and Carbon Corporation in the sum of $20,000. The other findings with reference to damages are cut off by my decision that the limitation in the West Virginia statute applies to this case, so I make no conclusion of law with reference to the excess damages except to say that if my conclusion is correct that the limitation applies, that the plaintiff is therefore not entitled to recover in this action anything beyond $20,000.

June 24, 1957

Bluefield, West Virginia

Harvey Goldstein, Esq.
Attorney at Law,
220 Broadway,
New York 38, New York

E. Franklin Pauley, Esq.
Attorney at Law,
Charleston, West Virginia

Charles M. Love, Esq.
Attorney at Law,
Charleston, West Virginia

William T. O'Farrell, Esq.
Attorney at Law,
Charleston, West Virginia

In re: Goett, Admx. v. Union Carbide & Carbon Corp.,
v. Amherst Barge Company, a Corp.

Civil Action No. 1755

Gentlemen:

At the conclusion of the hearing in this case which was tried by the Court as a case in admiralty, plaintiff was awarded a judgment of $20,000 against defendant Union Carbide & Carbon Corporation. No decision was made at that time with reference to the rights, if any, of that defendant against the third-party defendant, Amherst Barge Company. Counsel for the third-party plaintiff and the third-party defendant were requested to file briefs, which they have done.

In connection with the brief of the third-party plaintiff the Court was asked to make certain findings of fact and conclusions of law.

Requested finding of fact is as follows:

"The Court finds that Amherst Barge Company, third-party defendant herein, had exclusive custody, care and control of the unmanned tank barge CC 204 at the time Mr. Goett, plaintiff's decedent, fell therefrom."

I now make this finding of fact, deleting therefrom however the word "unmanned," since it is my opinion that the barge was not at the time an unmanned barge.

Other requested findings, which I deem to be findings of fact but which are requested as conclusions of law, are to the effect that the third-party defendant was negligent in not furnishing a life jacket to Mr. Goett and requiring him to wear it while performing his work; and in not erecting stanchions or railing around the edge of the deck of the barge.

I have already found as a fact that no negligent act of the third-party defendant contributed proximately to cause the death of Mr. Goett. I now further find as a fact that under all the circumstances disclosed by the evidence the third-party defendant was not negligent in not furnishing the life jacket and requiring Goett to wear it. I further find that while the preponderance of the evidence in my opinion, did not show that the absence of stanchions or railing contributed proximately to Goett's death, the third-party plaintiff, and not the third-party defendant, was negligent in not erecting such stanchions or railing.

Having made these findings of fact, counsel are advised that I have carefully considered the briefs submitted to me, the authorities cited, and the arguments made; and my conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett, Administratrix, etc., against defendant Union Carbide & Carbon Corporation.

It is suggested in the brief of the third-party plaintiff that the court may wish to hear evidence as to whether or not Amherst purchased the insurance required by its contract with Carbide.

I am of opinion that the contract is not in any sense ambiguous, and further, that it is immaterial to the decision of the present controversy whether Amherst did or did not purchase said insurance.

An order may be entered in accordance with the views expressed in this letter.

Yours truly,

BEN MOORE,
United States District Judge.

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation,
Defendant and Third Party Plaintiff
below, Appellant and Cross-Appellee,

versus

ELLEN GOETT, as Administratrix of the Estate of
Marvin Paul Goett, deceased,
Plaintiff below, Appellee
and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation,
Third Party Defendant
below, Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

(Argued April 9, 1958 Decided May 27, 1958)

Before:

SOBELOFF, *Chief Judge*, SOPER, *Circuit Judge* and
THOMSEN, *District Judge*.

CHARLES M. LOVE (DAYTON, CAMPBELL & LOVE, and CHARLES R. MCELWEE on brief) for Union Carbide Corporation, Appellant and Cross-Appellee; HARVEY GOLDSTEIN (E. FRANKLIN PAULEY and S. ELDRIDGE SAMPLINER on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant; and DAVID D. JOHNSON (JACKSON, KELLY, HOLT & O'FARRELL, and W. T. O'FARRELL on brief) for Amherst Barge Company, Appellee.

THOMSEN, *District Judge*:

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbibe & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge, it had no life rings or other rescue equipment. The principal question to be decided on this appeal is whether Carbide is liable to Goett's administratrix either for negligence or unseaworthiness because the barge was not so equipped.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys,[1] and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned

[1] 14 U. S. C. A. 63, 46 C.F.R. 31.15-5, 32.01-10, 33.40-5 (now 33.40-10).

tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life jacket, although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute,* alleging that

*W. Va. Code, 1955: "§ 5474. [5] Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. * * *"

"§ 5475. [6] Party Plaintiff in Such Action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars: Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

"§ 5477. [8] When Action Not to Abate; Survival of Action for Personal Injury against Wrongdoer; Time Within Such Action Must Be Brought.—Where an action is brought by a person injured for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections five and six of this article, and the case proceeded with as if the action had been brought under said sections. But in such case there shall be but one recovery for the same injury. * * *"

Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * * "; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U. S. 199. In 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. 761 et seq., but there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. 688. The Supreme Court has held, however, that "where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242; *Levinson* v. *Deupree*, 345 U. S. 648, 650. The West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death. *Dunsmore* v. *Hartman*, 140 W. Va. 357, 84 S. E. 2d 137; *Gulf, C. & S. F. T. Co.* v. *McGinnis*, 228 U. S. 173; *Continental Casualty Co.* v. *The Benny Skou*, 4 Cir., 200 F. 2d 246, 248, *cert. den.* 345 U. S. 992.

The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must be taken *cum onere*. *The Harrisburg*; *Levinson* v. *Deupree*; *Continental Casualty Co.* v. *The Benny Skou*; *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239, 245; *Curtis* v. *A. Garcia y Cia.*, 3 Cir., 241 F. 2d 30, 35. It has been generally held that any limitations in the state statute as to when suit must be brought, or the amount and character of damages which may be allowed, are binding on the admiralty court. See e.g. *Western Fuel Co.* v. *Garcia*; *Continental Casualty Co.* v. *The Benny Skou*; *Quinette* v. *Bisso*, 5 Cir., 136 F. 825, *cert. den.* 199 U. S. 606. A cause of action for damages accrued prior to a decedent's death, whether based

on unseaworthiness or on negligence, will survive if the applicable state statute so provides. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, at 430, n. 4; *Curtis* v. *A. Garcia y Cia*; *Holland* v. *Steag, Inc.*, D. Mass., 143 F. Supp. 203; *Meade* v. *Luksefjell*, S. D. N. Y., 148 Supp. 708. Cf. *Cox* v. *Roth*, 348 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383. Unlike statutes in some states, the pertinent West Virginia statute permits such survival only if an action has been commenced before the decedent's death, and requires that such action be conformed to an action for wrongful death. W. Va. Code, 1955, § 5477. [8]; *Railing* v. *Case*, N. D. W. Va., 131 F. Supp. 754; *Allen* v. *Hennis Freight Lines*, 139 W. Va. 480, 80 S. E. 2d 514. Of course, no such action was filed by Goett.

In the instant case liability for Goett's death is claimed on the basis both of unseaworthiness and of negligence.

A. There is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness. Cf. *Lee* v. *Pure Oil*, 6 Cir., 218 F. 2d 711, 714, and *Graham* v. *A. Lusi, Ltd.*, 5 Cir., 206 F. 2d 223, with *Halecki* v. *United New York*, 2 Cir., 251 F. 2d 708, and *Skovgaard* v. *The M/V Tungus*, 3 Cir., 252 F. 2d 14, noting the strong dissents in both *Halecki* and *Skovgaard*. See also *Kernan* v. *American Dredging Co.*

It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy.

The right to sue for injuries caused by unseaworthiness, which seamen have had since *The Osceola*, 189 U. S. 158, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 99, because they were "doing a seaman's work and incurring a seaman's hazards", and to carpenters in *Pope & Talbot* v. *Hawn*, 346 U. S. 400, 413, because: "The

ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." See also *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States Lines*, 347 U. S. 984. We extended the right to a watchman, supplied by an independent contractor, who was doing work customarily done by an officer or member of the crew. *Ross* v. *The Zealand*, 4 Cir., 240 F. 2d 820.

Since the decision below, however, this court has adopted the opinion of Judge Chesnut in *Raidy* v. *United States*, D. Md., 153 F. Supp. 777, aff'd. 4 Cir., 252 F. 2d 117, wherein he noted that the admiralty doctrine of unseaworthiness sprang from a consideration of the particular hazards affecting the crew of a ship in navigation. Raidy was a shipyard worker who was performing duties not within the competence or the customary activities of the crew. The ship was in drydock for structural changes; she was not subject to any of the perils of navigation. The crew had been discharged. The owner maintained no control over the work being done by the independent contractor other than the right to inspect to determine whether structural changes were being performed in accordance with the specifications. We concluded that Raidy's status was very different from that of a seaman and that it was a "misnomer" to speak of the removable and absent footplate through which he fell as "unseaworthiness of the ship." 252 F. 2d at 118. See also *Berryhill* v. *Pacific*, 9 Cir., 238 F. 2d 385, *cert. den.* 354 U. S. 938; *West* v. *United States*, E. D. Pa., 143 F. Supp. 473; *Berge* v. *National Bulk Carriers*, 2 Cir., 251 F. 2d 717. Cf. *Halecki* v. *United New York and Sheepyard* v. *The M V Tungus*.

In *Sieracki*, *Hawn* and *Petterson*, the vessels were in the general control of their officers, loading cargo, when the longshoremen and carpenters were hurt. Those cases hold that an owner's duty to provide a seaworthy vessel, with appurtenant supplies and equipment, is not affected by the relinquishment to another, such as a stevedoring company, of control of a portion of the ship or of a particular operation, such as loading.[3] In the instant case, however, the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, the drydock company. While in extent the work was not as great as in *Berryhill*, *Berge* and *Raidy*, in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would not have been inaccessible. The warranty of seaworthiness does not apply in that situation.

The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F. 2d 625, *cert. den.* 352 U. S. 889.

B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania*, 4 Cir., 159 F. 2d 784, and cases cited. A

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[3] See discussion in *Alaska S.S. Co.* v. *Petterson*, 205 F. 2d 478, at 479.

similar duty is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representatives of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901-950.[1] But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. *Lester* v. *United States; West* v. *United States; Raidy* v. *United States;* 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, *The Law of Torts*, vol. 2, sec. 21.1.

The judgment should have been entered in favor of defendant. This decision makes it unnecessary to pass on the other questions raised by the several parties.

Reversed.

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[1] Under the terms of that Act Goett's wife and children are now entitled to receive, without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.

Judgment

Filed and Entered May 27, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff below,
Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below,
Appellee.

Cross-appeals from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and

the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, with direction to enter judgment in favor of defendant (appellant and cross-appellee here) in accordance with the opinion of the Court filed herein; and that the costs on appeal be paid by the appellee and cross-appellant.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ROSZEL C. THOMSEN,
United States District Judge.

Opinion of the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1959.

Ellen Goett, as Administratrix of the Estate of Marvin Paul Goett, Deceased,

Petitioner,

v.

Union Carbide Corporation and Amherst Barge Company.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 18, 1960.]

Per Curiam.

This was a libel in admiralty brought against respondent Union Carbide Corporation by petitioner, the administratrix of Marvin Paul Goett. Goett had been an employee of respondent Amherst Barge Company, which was engaged in repairing a river barge owned by Union. The decedent was working on the barge when he fell off into the waters of the Kanawha River, and, after fruitless efforts at rescue, was drowned. The theory of the libel was that, alternatively, Union was negligent in turning over the barge to Amherst without its being equipped with rescue equipment, or that the vessel was unseaworthy without such equipment; and that the lack of rescue equipment caused the decedent's death. The accident had taken place in West Virginia waters and that State's Wrongful Death Act was relied upon. The District Court found that the vessel was in fact unseaworthy and that Union was negligent in the respect charged, causing the death of decedent, and that the decedent was not

shown to have been guilty of contributory negligence or to have assumed the risk. The District Court bottomed Union's liability on negligence, and awarded petitioner $20,000 in damages, the maximum allowable under the West Virginia Act, though finding that the actual damages were substantially higher. On Union's appeal to the Court of Appeals, the judgment was reversed. 256 F. 2d 449.

The Court of Appeals held that as a matter of law Union owed no duty to the employees of Amherst once the vessel had been turned over to the latter. It accordingly reversed the District Court's finding of negligence. It further held, contrary to the District Court, that the vessel was not unseaworthy at the time of the accident, and that in any event the decedent was not a person to whom the warranty of seaworthiness was owed. In the light of this determination, it did not pass on the question whether unseaworthiness would be in any event available as a ground for recovery in a West Virginia wrongful death action involving a maritime tort. We granted certiorari. 359 U. S. 923.

This case was decided in the lower courts before the decision of this Court in *The Tungus* v. *Skovgaard*, 358 U. S. 588, where it was decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdictions of the States in wrongful death cases. See *Hess* v. *United States*, *ante*, p. ——. Under this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.[1] Here the Court of Appeals did not decide which standard

[1] For examples of the general maritime law's concept of negligence, see *Kermerac* v. *Compagnie Generale Transatlantique*, 358 U. S. 625; *Pope & Talbot, Inc.* v. *Hazen*, 346 U. S. 406, 409; *The Max Morris*, 137 U. S. 1, 14-15.

the West Virginia Act adopted. It did not articulate on what basis it was applying federal law if in fact it was; there is no intimation that it believed the West Virginia Act incorporated the maritime law's negligence standard, and in fact it expressly left open the question whether that Act incorporated the maritime standard of seaworthiness. It seems more likely to us to have passed on the negligence issue as a matter of federal maritime law; it cited only cases applying the general maritime law's and the Jones Act's concepts of negligence, and general treatises; no West Virginia authority was relied upon.[2] The least that can be said is that it is highly doubtful[3] which law the Court of Appeals applied;[4] and so in the absence of any expression by it of which standard the West Virginia Act adopted, we do not believe we can permit its judgment to stand after our intervening decision in *The Tungus*.

Accordingly, so that the Court of Appeals, which is closer than we to matters of local law, may pass upon the questions of West Virginia law involved in the light of this Court's holding in *The Tungus*, we vacate its judgment and remand the cause to it to determine: "(a)

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[2] The respondent here cites West Virginia precedents in an effort to sustain the Court of Appeals' determination.

[3] The views of the dissenting opinions here confirm us in our doubts. Some of the dissents take the view that the Court of Appeals should be affirmed because it undoubtedly decided the point as a matter of state law, while another is of the view that the Court of Appeals should be affirmed because it made sufficiently clear that it decided the point as a matter of federal law. Our views lie between these two.

[4] While the Court of Appeals declared that "The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted." 256 F. 2d, at 453, this discussion seems to us probably to have been in the context of the monetary limitation of the Act. Certainly there was no specific identification of this statement with the discussion of whether the negligence finding was justified. And if the statement is taken to mean that a State cannot adopt the maritime standard, it is not correct.

Whether the West Virginia Wrongful Death Act, as to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; and, in the light of its determination, (b) whether the district judge's finding as to negligence is correct under the proper substantive law. to facilitate our discretionary review of the Court of Appeals' findings as to unseaworthiness, it should also determine and (c) whether the West Virginia Act incorporates this standard (unseaworthiness) of the general maritime law in death actions involving maritime torts." Cf. *Barr* v. *Matteo*, 355 U. S. 171.[3]

Vacated and remanded.

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[3] THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join this opinion, but solely under compulsion of the Court's ruling in *The Tungus* v. *Skovgaard*, 358 U. S. 588. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant, as in *The Tungus*, and is not the measure of recovery when it militates against the defendant, as in *Hess* v. *United States*, *ante*, p. —. However, they note their continued disagreement with the ruling in *The Tungus*, and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers. See the various separate opinions in this case and in *Hess* v. *United States*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1959.

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Petitioner,

v.

Union Carbide Corporation and Amherst Barge Company.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 18, 1960.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter joins, dissenting.

I dissent from the Court's disposition of this case on the following grounds:

First. For reasons elaborated in my Brother Stewart's dissenting opinion, there is no reasonable basis for concluding that the Court of Appeals' disposition of the negligence cause of action did not rest upon state substantive law, which in maritime wrongful death actions controls, *The Tungus* v. *Skovgaard*, 358 U. S. 588, if, as I expressed in my dissenting opinion in *Hess* v. *United States*, *ante*, p. —, it does not impose duties greater than those created by maritime substantive law.

In any event, there being no suggestion that the state standards of duty differ in any way from those obtaining under maritime law, the remand of the negligence cause of action to the Court of Appeals seems to me to be a needless and therefore wasteful procedure.

Second. As to the unseaworthiness cause of action, no one suggests that West Virginia has such a doctrine of its own. The Court of Appeals deliberately decided (256 F. 2d at 454) that it need not reach the difficult question of whether the West Virginia Wrongful Death Statute embraced a cause of action for unseaworthiness based on federal concepts, because it found that in any event, under federal law, the vessel was not unseaworthy, and that the petitioner was not one to whom the duty to provide a seaworthy ship was owing.

In resting its decision on these grounds the Court of Appeals exercised the traditional discretion of any court to choose what appears to it a narrower and clearer ground of decision in preference to a broader and more controverted one. The Court does not suggest that the limits of this discretion were exceeded in this instance. Cf. *Barr v. Matteo*, 355 U. S. 171. In my view we cannot properly require the Court of Appeals to decide a question which it intentionally and sensibly left open unless we first reverse that court on the issues which it did decide. This the Court does not do. Hence, I believe there is no justification for remanding the case on this score.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 18, 1960.]

Mr. Justice Whittaker, dissenting.

I am persuaded that the Court of Appeals has made sufficiently clear that it thought this diversity, admiralty, death case was governed by the general maritime law, as *remedially* supplemented by the West Virginia Wrongful Death statute, and properly decided it on that basis.

The Court's opinion says that *The M/V Tungus* v. *Skovgaard*, 358 U. S. 588, "decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases, [and that] [u]nder this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence." I do not understand the *Tungus* case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.

It seems to me that the substantive legal rights and liabilities involved in this admiralty case are not in any

true sense governed by West Virginia law, but rather, are within the full reach of exclusive admiralty jurisdiction and are to be measured by the standards of the general maritime law, *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628, as *remedially* supplemented by the West Virginia Wrongful Death statute. See *The Tungus*, *supra*, at 592.

Although state Wrongful Death statutes are not ones of survivorship and are generally spoken of as creating a *new* cause of action for death, it seems rather clear that the West Virginia Wrongful Death statute, like most others, creates a cause of action only in the sense of providing a *remedy* for death resulting from an act made wrongful by other laws—whether common, statutory or maritime laws—which would have redressed the wrong "if death had not ensued." W. Va. Code, 1931, § 5474 (5). And when, in a case encompassed by the terms of the State's Wrongful Death statute, admiralty "adopts" such statute, it does so only to afford a *remedy* for a substantive cause of action created by the maritime law which, "if death had not ensued," would have redressed it.

It is true that when admiralty "adopts" a State's Wrongful Death statute "it must enforce it as an integrated whole with whatever conditions and limitations the creating state has attached." *The Tungus*, *supra*, at 592. But the West Virginia Wrongful Death statute, like most such state statutes, apart from prescribing who may prosecute the action, the time within which it must be brought, and the measure and limit of recovery, has attached only the condition that the wrongful "act, neglect or default, [be] such as would . . . have entitled the party injured to maintain an action to recover damages in respect thereof [if death had not ensued]." W. Va. Code, 1931, § 5474 (5). Surely this means that the act, neglect or default, must be such as would, *under other laws*—whether common, statutory, or maritime laws—have entitled the party injured to recover damages in respect thereof "if death had not ensued."

Adoption by admiralty of such a remedial statute cannot be permitted to, and does not, so expand the essential purposes and characteristic features of the general maritime law as to interfere with its proper nation-wide harmony and uniformity. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242. By such adoption, admiralty takes over only the remedy afforded for death by the State's Wrongful Death statute—albeit the whole thereof. It does not thereby abandon the nonconflicting substantive admiralty law which gave rise to the right of action that it would have enforced "if death had not ensued." In such a case, the real and substantive right in suit is still the one created by, and—to the extent not conflicting with the adopted State Wrongful Death statute—is governed by, the maritime law.

This is what I understood the *Tungus* case to mean when I joined it, and re-examination of it confirms that conclusion. I submit there is not a word in it to the contrary. And this conclusion is buttressed by the dissent in that case. Although this Court has many times and uniformly held that the maritime law creates no cause of action for wrongful death, and that, in circumstances like these, admiralty "adopts" the State's Wrongful Death Act, the dissent in *Tungus* said, in effect, that admiralty would merely look to see whether the State had enacted a wrongful death statute and, if it had, would not "adopt" that act but would put it aside and fashion its own remedy for wrongful death, 358 U. S., at 608-609, which, I thought and still think, is contrary to this Court's cases holding that the maritime law does not create a cause of action for wrongful death and that, in actions for wrongful death arising on the territorial waters of a State, admiralty "adopts" the State's Wrongful Death Act *cum onere*.

I believe that the opinion of the Court of Appeals makes reasonably clear that the court regarded this case as governed by, and that it applied, the general maritime law as remedially supplemented by the West Virginia Wrongful Death statute. I also believe that the court correctly concluded that the maritime doctrine of unseaworthiness was not applicable, and that respondent was not guilty of negligence causing or contributing to cause the death of petitioner's decedent, because, as it found, the barge was both withdrawn from navigation for extensive repairs and completely out of respondent's control—points we thoroughly explored and decided only the other day. *West v. United States*, 361 U. S. 118. I would affirm.

SUPREME COURT OF THE UNITED STATES

No. 3.—October Term, 1959.

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Petitioner,

v.

Union Carbide Corporation and Amherst Barge Company.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 18, 1960.]

Mr. Justice Stewart, dissenting.

I.

In this wrongful death action it was incumbent upon the Court of Appeals to apply the substantive law of West Virginia. The Court today finds it "highly doubtful" whether the Court of Appeals did so. I entertain no such doubt for the following reasons: (1) This Court's "intervening decision"[1] in *The Tungus* v. *Skovgaard*, 358 U. S. 588, announced no new principle, but simply restated a doctrine well established in this Court. (2) Long before the decision in *The Tungus*, this doctrine had been specifically recognized as the law in the Fourth Circuit. (3) The express language of the Court of Appeals' opinion in the present case makes clear that the court under-

[1] The judgment of the Court of Appeals in the present case was entered May 27, 1958. The decision of this Court in *The Tungus* was announced February 24, 1959.

stood that its function was to apply West Virginia law, and that it did so.

Our decision in *The Tungus* simply reaffirmed a principle articulated in many decisions of this Court. This principle, compendiously stated, is that admiralty enforces "the *obligatio*" created by a state wrongful death action "as it would one originating in any foreign jurisdiction." *Levinson* v. *Deupree*, 345 U. S. 648, 652. See *The Harrisburg*, 119 U. S. 199; *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233.[2] Under this weight of authortiy it could be presumed that the Court of Appeals for the Fourth Circuit would recognize, as other federal courts have recognized whenever the specific question has arisen, that the right to recover for wrongful death occurring on the navigable waters of a State is to be determined by reference to state law.[3]

But there is no need to indulge in such a presumption, because the Court of Appeals for the Fourth Circuit, several years before the present case was decided, manifested a thorough understanding of the controlling doctrine

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[2] The law took a different turn with respect to state workmen's compensation laws. See *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. Such legislation was differentiated from state wrongful death statutes because of the greater burden imposed on shipowners by "heavy penalties and onerous conditions" of the compensation statutes, and because of the "novel remedies incapable of enforcement by an admiralty court." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 166. More than 15 years ago this Court pointed out that "[T]he *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306, 309. Cf. *Davis* v. *Department of Labor*, 317 U. S. 249; *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U. S. 272.

[3] See, *e. g.*, *Turner* v. *Wilson Line of Massachusetts*, 242 F. 2d 414 (C. A. 1st Cir.); *United Pilots Assn.* v. *Halecki*, 251 F. 2d 708 (C. A. 2d Cir.), judgment vacated and cause remanded, 358 U. S. 613; *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30 (C. A. 3d Cir.); *Graham* v. *A. Lusi, Ltd.*, 206 F. 2d 223 (C. A. 5th Cir.); *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 6th Cir.).

exactly in accord with the principles confirmed by this Court last Term in *The Tungus*. In *Continental Casualty Co.* v. *The Benny Skou*, 200 F. 2d 246 (C. A. 4th Cir. 1952), a suit to recover for a death occurring on board a ship in the territorial waters of Virginia, the court held that the action was barred by the one-year limitation contained in the Virginia Wrongful Death Act. The court's reasoning was unambiguous: "The right of action which appellant has sought to enforce is one created solely by the Virginia statute. . . . 'Virginia has bestowed upon admiralty a right to grant a recovery not previously possessed by admiralty.' The endowment must be taken *cum onere*.' As appellant grounds his action upon the Virginia statute, he is obliged to accept the statute in its entirety as construed by the Virginia court of last resort." 200 F. 2d. at 250.

Even if the Court of Appeals for the Fourth Circuit had not previously expressed such a clear understanding that cases like these are controlled by the substantive law of the State, I think that its opinion in the present case, standing alone, unambiguously shows a recognition of the duty to apply the substantive law of West Virginia. What the court said seems to me quite clear: "The maritime law does not allow recovery for wrongful death. . . . The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must be taken *cum onere*." 256 F. 2d. at 453. This Court's suggestion that the above language was confined to the issue of the monetary limitation upon damages in the West Virginia statute is to me entirely unconvincing, because the Court of Appeals never reached the question of damages.

II.

Even if I were able to agree that it is uncertain whether the Court of Appeals decided this case under standards of state or federal law, I still could not join in the Court's judgment. For even if the Court of Appeals mistakenly

applied substantive standards of federal maritime law, no purpose could be served by remanding this case unless it were shown that the state law is somehow more favorable to the petitioner. But there has been no showing—nor any suggestion—that the law of West Virginia is in any way more favorable to plaintiffs than the general maritime law.[4] Contrast *Hess* v. *United States*, *ante*, p.—.

A remand of this case is equally pointless on the issue of whether, as a matter of West Virginia law, the state death statute incorporates the maritime duty of providing a seaworthy vessel. The district judge found that the barge was unseaworthy, but went on to hold that "this case is not one for the applicability of the doctrine of liability without fault." The Court of Appeals expressly refrained from deciding whether the West Virginia Wrongful Death statute has imported the maritime concept of unseaworthiness, finding that the circumstances of this case were not such as to impose liability under that concept, even if incorporated in the state statute. The court found as a fact that the barge was not unseaworthy, and held as a matter of law that in any event there could be no warranty of seaworthiness with respect to a vessel withdrawn from navigation and delivered into the sole custody and control of a dry dock company for the purpose of major repairs. Only last month we unanimously held that this view of the scope of unseaworthiness liability is correct. *West* v. *United States*, 361 U. S. 118. There is no point in requiring the Court of Appeals to make what would therefore be so completely irrelevant an inquiry into an elusive question of state law.

I would affirm.

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[4] Indeed the case was submitted to us upon the *contrary* assumption. The petitioner's argument was pitched upon his contention that we should overrule *The Harrisburg*, 119 U. S. 199, so that his rights would be determined under *federal* law. The respondent relied upon West Virginia decisions in urging affirmance.

Opinion of United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff below,
Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below,
Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON. BEN MOORE DISTRICT JUDGE.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(Argued March 28, 1960. Decided April 19, 1960.)

Before:

SOBELOFF, *Chief Judge*, SOPER, *Circuit Judge*, and THOMSEN, *District Judge*.

HARVEY GOLDSTEIN (ERNEST FRANKLIN PAULEY and S. ELDRIDGE SAMPLINER on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant.

CHARLES M. LOVE (CHARLES R. MCELWEE on brief) for Union Carbide Corporation, Appellant and Cross-Appellee.

DAVID D. JOHNSON (JACKSON, KELLY, HOLT & O'FARRELL, and W. T. FARRELL on brief) for Amherst Barge Company, Appellee.

THOMSEN, *District Judge*:

The Supreme Court has remanded this case, *Goett v. Union Carbide Corp.*, 361 U. S. 340, so that this court may determine three questions, stated by the Supreme Court as follows:

> "(a) Whether the West Virginia Wrongful Death Act, as to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; and, in the light of its determination, (b) whether the district judge's finding as to negligence is correct under the proper substantive law. To facilitate our discretionary review of the Court of Appeals' findings as to unseaworthiness, it should also determine whether the West Virginia Act incorporates this standard of the general maritime law in death actions involving maritime torts."

The facts are fully stated in the original opinion of this court, 256 F. 2d 449, and are summarized in the opinion of the Supreme Court.

A

The Tungus v. *Skovgaard*, 358 U. S. 588, and *United Pilots Assn.* v. *Halecki*, 358 U. S. 613, as interpreted by a majority of the Supreme Court in *Goett* and in *Hess* v. *United States*, 361 U. S. 314, held that "in an action for wrongful death in state territorial waters the conduct sued to give rise to liability is to be measured not under admiralty's standards, but under the substantive standards of the state law." 361 U. S. at 319. "Under this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence." 361 U. S. at 342.

In his dissents in *Hess* and *Goett*, 361 U. S. 339 and 344, Mr. Justice Whittaker, who was one of the majority of five in *Skovgaard* and *Halecki*, has stated that he does not interpret *Skovgaard* in the manner quoted above, and has indicated that he believes such cases are governed by "the general federal maritime law as remedially supplemented by the State's Wrongful Death Act." This brings him close to the position of the four justices who dissented in *Skovgaard* and *Halecki* and concurred "under compulsion" in *Hess* and *Goett*. It is not for us to resolve this problem, and in the view we take of the law it would make no difference in our answer to question (b) whether we follow the rule stated in the "Opinion of the Court" in *Hess* and in *Goett* or the rule suggested by Mr. Justice Whittaker in his dissents.

There is no West Virginia case in point, although the Supreme Court of West Virginia has held that its Wrongful Death Act should be liberally construed. *Richards* v. *Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437. We have considered the arguments on both sides so well developed in the majority and minority opinions of the Second Circuit in *Halecki*, 251 F. 2d 708, and of the Third Circuit

in *Skovgaard*, 252 F. 2d 14, which construed a statute essentially similar to the West Virginia Act. See also *Hollis* v. *S.S. Manfred Stansfield*, 4 Cir., 269 F. 2d 337, and *State* v. *A/S Nabella*, D. Md., 176 F. Supp. 668, noting that the construction of the Virginia and Maryland Acts was aided by comparatively recent amendments to those Acts, giving the right to proceed in rem against a ship. There is no such provision in the West Virginia Act; that is an element to be considered, but it is not conclusive, since this is not an action in rem.

The West Virginia statute, like most wrongful death statutes, provides basically that if death is caused by an act, neglect or default which would have entitled the injured party to maintain an action if he had lived, then the person who would have been liable for the injury will be liable under the statute for the death. If Goett had survived he could have brought an action against Union Carbide in the West Virginia courts for the alleged negligence and unseaworthiness, and his right to recover in such an action would have been governed by general maritime law. It is true that such an action based on unseaworthiness was not recognized in 1863, when the West Virginia Wrongful Death Act was adopted, and that the principles presently controlling the negligence aspect of such an action had not been fully developed. We find, however, that the West Virginia legislature, in adopting the Wrongful Death Act, did not intend to limit recovery thereunder to actions based on the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the statute was intended to cover all wrongful acts, neglects and defaults which from time to time would entitle an injured party to maintain an action under the applicable substantive law, whether the common law, statutory law or maritime law. The West Virginia courts apply all three, in appropriate cases.

We conclude that in a maritime tort death case West Virginia would "choose to incorporate the general mari-

time law's concepts of unseaworthiness and negligence."

Counsel for Union Carbide argues that such a construction of the West Virginia Act violates the separation of powers doctrine, that a state legislature cannot delegate its law-making power to another branch of government, whether judicial or legislative. We have found no authority supporting Union Carbide's argument. No delegation of law-making power is involved. The separation of powers doctrine does not require that the Wrongful Death Act be frozen so that it cannot respond to the development of the common law, as interpreted by West Virginia courts, or to the development of the maritime law.

B.

Although we have concluded that the Supreme Court of West Virginia would apply maritime law concepts of negligence in such a case as this, we do not believe that it would run ahead of the federal courts and create duties not heretofore recognized or enforced by the Supreme Court of the United States or by the weight of other federal authority, and not applied by West Virginia courts in analogous situations.

In our former opinion in this case we said: "Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. Sadler v. Pennsylvania R. Co., 4 Cir., 159 F. 2d 784, and cases cited. A similar duty is owed to business visitors who come aboard while the vessel is in the custody and control of her owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty

under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchion should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. secs. 901-950. But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. Lester v. United States [2 Cir., 234 F. 2d 62, cert. den. 352 U. S. 889]; West v. United States [E. D. Pa., 143 F. Supp. 473]; Raidy v. United States [D. Md., 153 F. Supp. 777, aff'd 4 Cir., 252 F. 2d 117]; 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, The Law of Torts, vol. 2, sec. 21.1."

Since our opinion in this case was written *West* has been affirmed by the Third Circuit, 256 F. 2d 671, and by the Supreme Court, 361 U. S. 118, emphasizing the importance of control of the vessel at the time of the injury as the decisive factor on both aspects of the case, negligence and unseaworthiness. See also, *Halecki*, supra. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, and *Lawlor* v. *Socony Vacuum Oil Co.*, 2 Cir., F. 2d , at , in all of which the vessel was in the control of the owner. The owner was also in general control of the vessel in all the stevedore and other cases cited by libelant. We adhere to our previous opinion on this point as a proper application of the general maritime laws' concept of negligence. It is also in line with the principles applied by West Virginia courts in analogous situations. *Sesler* v. *Coal Co.*, 51 W. Va. 318, 41 S. E. 216. Cf. *Roberts* v. *Axe and Tool*

Co., 101 W. Va. 276, 148 S. E. 70, where the owner was in control of the premises. See also *Trimyer* v. *Norfolk Tallow Co.*, 192 Va. 776, 66 S. E. 2d 441.

C.

As stated above, we believe the West Virginia Act incorporates the general maritime law of unseaworthiness in death actions involving maritime torts. Our previous findings that Goett was not a person to whom the warranty of seaworthiness ran, and that the barge was not unseaworthy, is supported by the decision of the Supreme Court in *West*, supra. See also *Lauter*, supra.

We adhere to our decision that judgment should have been rendered in favor of the defendant.

Judgment

(Filed and entered on April 19, 1960.)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

—o—

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff below,
Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below,
Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

—o—

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of West Virginia on remand from the Supreme Court of the United States, and was argued by counsel.

On Consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, with direction to enter judgment in favor of defendant (appellant and cross-appellee here) in accordance with the opinions of the Court filed herein; and that the costs on appeal be paid by the appellee and cross-appellant.

April 19, 1960.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit.

A true copy, Teste:

Richard M. F. Williams Jr.,
Clerk of the United States Court of Appeals for the Fourth Circuit.

Filed
Apr 19 1960

R. M. F. Williams, Jr.,
Clerk.

(Seal)